



G. Trenholm Walker
 Thomas P. Gressette, Jr.
 Ian W. Freeman
 John P. Linton, Jr.
 Charles P. Summerall, IV
 Jennifer S. Ivey

THOMAS P. GRESSETTE, JR.
 Direct: 843.727.2249
 Email: Gressette@WGFLAW.com

July 31, 2020

Via Electronic Filing and US Mail

The Honorable Jocelyn G. Boyd
 Chief Clerk and Administrator
 Public Service Commission of South Carolina
 101 Executive Center Drive, Suite 100
 Columbia, South Carolina 29210

RE: *In re: South Bay at Mount Pleasant, LLC*, Docket 2020-152-E

Dear Ms. Boyd:

Enclosed please find the following, which are herewith submitted via the Public Service Commission DMS and by US Mail:

- Petitioner's Reply to DESC Response to Petition for Exception to Regulation 103-327(A); and
- Certificate of Service.

Please do not hesitate to contact me if you require any further action.

Sincerely,

/s/

Thomas P. Gressette, Jr.

cc: J. Ashley Cooper, Esq. (Dominion Energy Southeast Services, Inc.) (via email only)
 K. Chad Burgess, Esq. (Dominion Energy Southeast Services, Inc.) (via email only)
 Jeffrey M. Nelson, Esq. (S.C. Office of Regulatory Staff) (via email only)

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-152-E

IN RE:

SOUTH BAY AT MOUNT PLEASANT, LLC

**PETITIONER'S REPLY
TO DESC RESPONSE TO
PETITION FOR EXCEPTION
TO REGULATION 103-327(A)**

SUMMARY

The Petitioner owns and operates South Bay at Mount Pleasant, which is a Continuing Care Retirement Community ("South Bay CCRC"). On June 15, 2020, Petitioner filed its Petition with Verification for Exception to Regulation 103-327(A) ("the Petition"). The Petition provides verified statements of fact justifying the request for an Order:

- (1) Excepting South Bay CCRC from the individual metering requirement of S.C. Code Ann. Regulation 103-327(A), because the Petitioner is not constructing a "new multi-occupancy residential premises" subject to the Regulation; or
- (2) In the alternative, excepting South Bay CCRC from the individual metering requirement of Regulation 103-327(A), because individual metering at Petitioner's property is impractical and unreasonable.

On July 24, 2020, Dominion Energy South Carolina, Inc. ("DESC") filed a Response to the Petition. Opposing the Petition, DESC generally claims there is some safety issue involved with the relief sought and then suggests, in the alternative, that if the Petition is granted then South Bay CRCC should be somehow assigned responsibility for potential liabilities related to DESC's provision of electric service to the South Bay CRCC site. However, as herein set forth, DESC's Response is not supported and its request to realign the parties' liability is not authorized.

DISCUSSION

S.C. Regulation 103-327 applies specifically to “new multi-occupancy residential premises at which units of such premises are separately rented, leased or owned shall be delivered by an electrical utility on the basis of individual meter measurement for each dwelling.” As more fully explained in the Petition, South Bay CRCC is not a “new multi-occupancy residential premises” but is, instead, a Continuing Care Retirement Community, as that term is defined in S.C. Code Ann. § 37-11-10, *et seq.* See Petition for Exception, *generally*, and at ¶17 to ¶24 (discussing why S.C. Regulation 103-327(A) does not apply to South Bay CRCC).

Attempting to distract from this important distinction, the DESC Response proposes a retelling of the history and purpose of both Regulation 103-327 and the Federal Public Utilities Regulatory Policies Act of 1978 (“PURPA”) to suggest that the requested exception should be denied because it poses some unspecified public health risk. See DESC Response at p.4 (asserting “Regulation 103-327(A) relates to the delivery of energy and was enacted to enhance the safety and reliability of power delivery to electric energy customers.”). While the DESC Response does correctly report that Regulation 103-327 was passed in relation to PURPA, the Response’s characterizations of PURPA and Regulation 103-327 are imprecise.

Congress passed PURPA “partly in response to energy shortages and partly due to electricity sustainability concerns.” Conor T. Burns, *Sale or No Sale: Is It Time to Turn Back the Meter on State Net Metering Policies?*, 17 Fla. St. U. Bus. Rev. 149, 156 (2018). In 1978 when Congress enacted PURPA, “the nation was in the midst of an energy crisis.... PURPA was passed to help lessen the dependence on fossil fuels and promote the development of power generation from non-utility power producers.” Danielle Powers, *Has the Public Utilities Regulatory Policy Act (“PURPA”) Outlived Its Purpose?*, available online at <https://ceadvisors.com/has-the-public->

utilities-regulatory-policy-act-purpa-outlived-its-purpose/.

PURPA's purpose was to create programs related to the regulation of the business of selling electricity; the focus was not any public health matter implicated by local decisions as to individual versus master metering. The specifically stated purposes of PURPA are to:

- increase conservation of electric energy,
- increase efficiency in the use of facilities and resources by electric utilities,
- provide equitable retail rates for electric consumers,
- improve the wholesale distribution of electric energy ...[and]... the procedures concerning consideration of wholesale rate applications before the Federal Energy Regulatory Commission, the participation of the public in matters before the Commission,
- provide for the expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power,
- provide for the conservation of natural gas while insuring that rates to natural gas consumers are equitable, and
- to encourage the development of crude oil transportation systems.

PURPA, 16 U.S.C.A. § 2601(1) through (5). Thus, contrary to the suggestion by the DESC Response, PURPA was intended to address energy shortages and sustainability and that was also the purpose of S.C. Regulation 103-327. There is no actual—or even implied—safety risk to the public being addressed by Regulation 103-327 such that an exception (like the one requested here) should be considered to in any way to pose a threat to the community. Likewise, the Response's references to shifting liability and “the responsibilities and safety risks involved with master metering” are red herrings. DESC does not identify a single threat or risk at issue. These unfounded arguments and associated innuendos should be disregarded.

The South Carolina Office of Regulatory Staff agrees with the Petitioner as to what is involved in a determination of the instant Petition. Writing for the Office, Chief Legal Officer Jeffrey M. Nelson provided the position of ORS:

The Office of Regulatory Staff (“ORS”) has reviewed the Petition of South Bay of Mount Pleasant, LLC (“South Bay”) for an Exception to Regulation 103-327(A).

ORS believes that both the customer and utility are ably represented by counsel in this matter. Further it does not appear to ORS that the decision of the Commission regarding this requested waiver of S.C. Code Ann. Reg. 103-327 will impact the provision, preservation or investment of utility facilities so as to provide reliable and high-quality utility services and is not averse to the public interest.

Therefore, ORS takes no position on the request of South Bay for a waiver of Regulation 103-327.

Letter from Nelson to Hon. Jocelyn G. Boyd (July 17, 2020) found at DMS Docket Entry #292842.

Even if this Commission does not exempt South Bay CRCC from the individual metering requirement of S.C. Code Regulation 103-327, because as a CRCC South Bay CRCC is not “a multi-occupancy residential premises” requiring multiple meters, the Petition establishes that individual metering to the premises is impractical and unreasonable. Notably, the DESC Response does not dispute the sworn statements of the Petition regarding the economic costs and other impacts demonstrating compliance is impractical and unreasonable:

Delays and Cost Increases:

Subjecting South Bay CRCC to ... Regulation 103-327(A) would require South Bay CRCC to redesign its plans for garden units to have individual meters would result in delays and cost increases while it seeks various approvals from, among others the City of Mount Pleasant Design Review Board. Petition at ¶27.

Disparity Among Rates of South Bay CRCC Residents:

Modification and redesign of the garden flat living units to be individually metered would also be very expensive and could impact the currently planned rental prices which are established so that they will be consistent with rates currently in place for the other living units at South Bay CRCC. Petition at ¶28.

Estimated Cost to Petitioner of \$175,000

Requiring each living unit to have its own meter would also require individual

automatic transfer switches and changes in electrical design necessary to support an automatic transfer switch for every garden flat living unit. This redesign process and the cost associated would be prohibitively expensive and cause Petitioner to suffer additional engineering costs, as well as costs associated with additional governmental approvals. Petitioner estimates the total additional costs would be approximately \$175,000. Those changes, associated costs estimated at \$175,000, and potential delays in construction demonstrate that individual metering is impractical and unreasonable. Petition at ¶¶29 and 36.

Billing Associated with Individual Metering Would Be Onerous

If, for some reason, the individual accounts for the garden flat living units were required to be established in the name of the resident of each garden flat, that would likely create even more work for staff to pay all the monthly bills. If the residents were required to pay the bills themselves, it would create an impractical and unreasonable distinction between our residents as well as the opportunity for service interruption if a resident did not pay her bill. Many residents choose South Bay CRCC because they are not able to effectively manage the payment of multiple bills; hence, they are moving to South Bay CRCC to avoid the task of managing utility accounts and making payments. Petition at ¶35.

Interference with Ease of Transfer to Higher Care Levels

Individual electric metering is also impractical and unreasonable for South Bay CRCC because it would interfere with the essential goal of providing ease of transition between living units of varying care levels. Petition at ¶37.

See Petition with Verification at ¶¶27 to 37, as verified by Craig Spivey, Construction Manager for Petitioner. This evidence is unchallenged and undisputed and it amply supports a conclusion that exception pursuant to Regulation 103-327(B) is justified because individual metering is impractical and unreasonable. *See also* Order 2020-213, *In re: Lakeview Retirement Community LLC's Request for Exception to Commission Regulation 103-327(A)*, wherein the Commission found compliance impractical; and unreasonable because, as in the instant case, construction had already begun with the single meter concept, the increased additional cost of switching the Project to individual meters was substantial, the all-inclusive rental arrangement provided to residents will be charged as a flat monthly rental fee, which includes all utilities (except personal telephone), all meals, housekeeping, and a list of other amenities, and the applicant confirms it will not bill residents for electricity.

The DESC Response also requests that “If the Commission grants the requested waiver, DESC respectfully requests such order to condition the waiver on South Bay assuming responsibility for the safety and reliability of power delivery from the master meter to the individual dwellings.” Response at p. 6. This relief is not authorized by S.C. Regulation 103-327 and awarding the same would be in excess of the Commission’s subject matter jurisdiction.

Subject matter jurisdiction is “the power to hear and determine cases of the general class to which the proceedings in question belong.” *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994). It is well established that this Commission is a body of limited jurisdiction and has only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted.” *Black River Elec. Co-op., Inc. v. Pub. Serv. Comm’n*, 238 S.C. 282, 292, 120 S.E.2d 6, 11 (1961) (citing *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 49 S.E.2d 564 (1948) and *Piedmont & Northern Railroad Co. v. Scott et al.*, 202 S.C. 207, 24 S.E.2d 353 (1943)). The limitations upon the Commission’s jurisdiction are not treated lightly by the Commission or by South Carolina courts. In fact, when faced with a controversy that does not fall clearly within the confines of its prescribed jurisdiction, the Commission is required to abstain from exercising any power over the controversy:

Such bodies, [including specifically the South Carolina Public Service Commission], being unknown to the common law, and deriving their authority wholly from constitutional statutory provisions, will be held to possess only such powers as are conferred expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted. See 51 C.J. 36, 37, where among other things it is said: “Any reasonable doubt of the existence in the Commission of any particular power should ordinarily be resolved against its exercise of the power.”

S.C. Elec. & Gas Co. v. Pub. Serv. Comm’n, 275 S.C. 487, 489–90, 272 S.E.2d 793, 794–95 (1980).

Furthermore, in *Piedmont v. Northern Railroad Co.*, the South Carolina Supreme Court cautioned that “the Supreme Court of the United States has pointed out that asserted powers [of regulating

commissions] are not to be derived from mere inference. They must be founded upon language in the enabling acts... .” *Piedmont & N. Ry. Co. v. Scott*, 202 S.C. at 223-224, 24 S.E.2d at 360 (1943) (citing *Siler v. Louisville & N. R. Co.*, 213 U.S. 175, 29 S.Ct. 451 (1909) [regarding state commissions] and *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U.S. 479, 17 S.Ct. 896 (1897) [regarding federal commissions]).

Finally, even if the Commission was authorized by Regulation 103-327 to provide the relief DESC seeks, its Response fails to provide the Commission with any evidence, much less reliable, probative, and substantial evidence to support the request. Further, DESC has not specified the way it wishes the Commission to alter the liability among the parties. Without the necessary specificity and without any evidence, DESC is not entitled to an order shifting “responsibility for the safety and reliability of power delivery from the master meter to the individual dwellings,” as vaguely requested by the DESC Response.

CONCLUSION

South Bay CRCC should not be regulated as a “new multi-occupancy residential premises” pursuant to S.C. Code Ann. Regulation 103-327(A). Alternatively, even if the Regulation applies, requiring South Bay CRCC to comply with Regulation 103-327(A) for its 54 garden flat living units would be impractical, unreasonable, economically unfeasible, and present an added difficulty for residents; as such, an exception pursuant to Regulation 103-327(B) is appropriate.

WHEREFORE, Petitioner respectfully requests that the Public Service Commission issue an Order:

- (1) Excepting South Bay CCRC from the individual metering requirement of S.C. Code Ann. Regulation 103-327(A), because the Petitioner is not constructing a “new multi-occupancy residential premises” subject to the Regulation; or

- (2) In the alternative, excepting South Bay CCRC from the individual metering requirement of Regulation 103-327(A), because individual metering at Petitioner's property is impractical and unreasonable.¹

Respectfully submitted,

/s/ Thomas P. Gressette, Jr.

Thomas P. Gressette, Jr. (Fed ID# 7261)

Direct: (843) 727-2249

Email: Gressette@WGFLAW.com

G. Trenholm Walker (Fed ID# 4487)

Direct: (843) 727-2208

Email: Walker@WGFLAW.com

WALKER GRESSETTE FREEMAN & LINTON, LLC

Mail: P.O. Drawer 22167, Charleston, SC 29413

Office: 66 Hasell Street, Charleston, SC 29401

Phone: (843) 727-2200

ATTORNEYS FOR PETITIONER

SOUTH BAY AT MOUNT PLEASANT, LLC

July 31, 2020
Charleston, SC

¹ Pursuant to Consent Order, Order 2020-478, this matter shall be granted expedited review and the Commission notes the parties' agreement that the Petition may be considered based upon the parties' paper filings and without a hearing.

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-152-E

IN RE:

PETITION WITH VERIFICATION OF SOUTH
BAY OF MOUNT PLEASANT, LLC FOR
EXCEPTION TO REGULATION 103-327(A)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I CAUSED THE RESPONSE OF SOUTH BAY TO DESC'S
RESPONSE TO PETITION TO BE FILED ELECTRONICALLY VIA THE PUBLIC SERVICE
COMMISSION DMS AND TO BE SENT VIA US MAIL TO:

The Honorable Jocelyn G. Boyd
Chief Clerk and Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

WITH COURTESY COPIES SENT VIA EMAIL TO:

J. Ashley Cooper, Esq. (Dominion Energy Southeast Services, Inc.)
K. Chad Burgess, Esq. (Dominion Energy Southeast Services, Inc.)
Jeffrey M. Nelson, Esq. (S.C. Office of Regulatory Staff)

/s/ Thomas P. Gressette, Jr.
Thomas P. Gressette, Jr.

July 31, 2020
Date